Court of Appeals No. 47129-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JAMES AND LAURA WALSH, a married couple,
KIM AND LORI HASSELBALCH, a married couple,

Appellants / Defendants

v.

RONALD HALME, an individual,

Respondent / Plaintiff

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal of an order granting summary judgment to Ronald Halme, the Respondent/Plaintiff ("Halme"), and denying a motion for summary judgment to the Appellants/Defendants, James and Laura Walsh and Kim and Lori Hasselbalch (collectively "Walsh"). Walsh believes the trial court erred in granting summary judgment based upon the issues presented and the right of an organization to govern itself without the interference of the courts.

II. ASSIGNMENTS OF ERROR

A. DID THE COURT ERROR IN GRANTING SUMMARY JUDGMENT TO HALME AND IN DENYING SUMMARY JUDGMENT TO WALSH?

B. DID THE COURT ERROR IN DENYING WALSH'S MOTION FOR RECONSIDERATION?

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

RCW 64.38.010(11) defines a homeowners' association to include an:

> unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. "Homeowners' association" does not mean an association created under chapter 64.32 or 64.34 RCW.
>
> Nosko Tract – Phase Two Includes Nine Lots Within A Specifically Defined Geographical Territory, The Owners

Of Which Are Required To Pay Assessments For Maintenance Of A Common Roadway.

1. **Is Nosko Tract – Phase Two A Homeowners' Association Under This Definition?**

2. **Can A Trial Court Create Exceptions To Or Carve Out Exceptions To A Homeowners' Association If It Falls Under The Definition Provided Above?**

3. Road Maintenance and Use Agreement ("RMA") for Nosko Tract – Phase Two includes a section titled "Rules of Conduct" which includes prohibitions on how the residents of Nosko Tract – Phase Two can conduct themselves. **Do The Owners Of Nosko Tract – Phase Two Have The Right To Amend These Rules Of Conduct And To Add Internal Governing Procedures, *I.E.*, Fines For Violations Of The Rules And An Appellate Procedure That Are Consistent With The Rules Of Conduct?**

4. **Does The Trial Court Have The Authority To Interfere With The Internal Governance Of Nosko Tract – Phase Two?**

III. STATEMENT OF THE CASE

Halme filed his Complaint for Declaratory Judgment on September 19, 2014. (CP 1) It alleged that a dispute had arisen between the parties regarding their rights and duties under the CC&Rs and whether the Nosko Tract – Phase Two Homeowners' Association legally existed. (CP 4) Walsh filed an Answer to Halme's Complaint and counterclaims alleging that Nosko Tract – Phase Two was a homeowners' association as defined, under RCW 64.38.010(11) (CP 9); that the RMA which was recorded on June 29, 1990 made all of the owners of Nosko Tract liable for the assessments for maintenance of the road and provided for Rules of Conduct for using the road (CP 8); that it had properly adopted

amendments and a Fine Schedule and Appellate Procedure for violating the Rules of Conduct; that there was a dispute among the parties concerning the RMA and whether Nosko Tract – Phase Two Homeowners' Association legally existed; that it had the authority to adopt Bylaws, a Fine Schedule and an Appellate Procedure and asked the Court to validate such actions; and asked for attorney's fees and costs under the RMA and RCW 64.38.050. Both parties moved for summary judgment. (CP 90; 107) A hearing was held on November 21, 2014 where the Trial Court defined the issues as follows:

> But on the limited question I have before me - which is whether either the Road Maintenance Agreement itself allows amendments to create all of the things that we are talking about here, the by-laws, the fine schedule, the Board of Directors, the appellant procedure - or that the existence of the Road Maintenance Agreement coupled with the later adoption of the statute automatically converted the Road Maintenance Agreement into a Homeowners' Association.

(RP 26-27) The Court determined that there were two issues before it. The first was whether the RMA allowed amendments adopted by the owners of Nosko Tract – Phase Two to govern itself including the adoption of Bylaws, a Fine Schedule, the election of a Board of Directors, and an Appellate Procedure. The second issue was whether the RMA itself met the definition of a homeowners' association in the statute cited

above thus converting the RMA into a homeowners' association subject to Chapter 64.38 RCW.

An order on summary judgment finding that Nosko Tract – Phase Two could not govern itself internally either under the RMA or under the statute was entered on January 9, 2015. (CP 256)

Nosko Tract – Phase Two comprises nine lots, five of which are owned by James and Laura Walsh. (CP 8) It is part of a larger entity, Nosko Tract, which was created under Clark County Auditor's Number 83-10110099 in Clark County, Washington, in 1983. (CP 7) On June 29, 1990, the owners of all of the lots in Nosko Tract – Phase Two signed and recorded a "Road Maintenance and Use Agreement" ("RMA") to govern an internal road and to provide Rules of Conduct. (CP 8) The RMA ran with the land and was binding upon the owners, their heirs, successors and assigns. The RMA was recorded under Auditor's Number 9203-09-0152. (CP 8)

In 2011, a lawsuit was filed by Walsh against Halme on the issue of whether Halme had the right to put up a gate across the private road without consulting with or getting the agreement of the other owners. (CP 8) Eventually, that lawsuit was settled, Halme was required to remove the gate but the lawsuit cost Walsh $40,000 in attorney's fees. (CP 47, 77-80, RP 30) To avoid this expense in the future, Walsh and a co-defendant, Hasselbalch, decided to organize Nosko Tract – Phase Two and adopt rules and procedures to manage the Rules of Conduct that allowed them to govern internally. (CP 8)

In addition to putting a gate up across the private road, Halme and his family conducted themselves in ways that were unacceptable to Walsh and their friends and family. (CP 148-150, 169-174) The private road in Nosko Tract – Phase Two is a narrow, one-lane road. (CP 150) In some areas, two vehicles cannot pass side-by-side. (CP 150) Walsh has lived on their property for twenty years. (CP 149) Before Halme moved in, they had no issues with any of their neighbors. (CP 149) Since approximately November of 2010, however, Halme has engaged in the following conduct:

a. They have purposefully blocked the road by driving very slowly on it, 5-10 mph or by completely stopping; (CP 150)

b. They have walked down the middle of the road and when vehicles approached, refused to move off so the vehicles could pass; (CP 149) and

c. They have harassed Walsh and their friends who have ridden horses on the private road by letting their dogs chase after them and by revving engines on their ATVs in an attempt to scare the horses. (CP 149)

This conduct has been experienced not only by Walsh but also by their friends and family, including Carmen and Jean DeFlumeri; Jennifer Gilmore; and Arlene Weir. (CP 149)

The prior owner of the Halme lot, Lloyd Clemans, testified that although the RMA provided a method to govern the road, for the ten years he lived in Nosko Tract – Phase Two they never had to refer to it because the owners maintained the road by mutual agreement. He stated: "This mutual agreement worked well for us in our ten years at that location. We

had a wonderful relationship with all of our immediate neighbors."[1] (CP 174)

IV. SUMMARY OF ARGUMENTS

A. THE RMA FOR NOSKO TRACT – PHASE TWO MEETS THE DEFINITION OF A HOMEOWNERS' ASSOCIATION UNDER RCW 64.38.010(11).

The wording of the statute is clear and unambiguous. It should be applied to Nosko Tract – Phase Two as written. Doing so results in Nosko Tract – Phase Two being recognized as a homeowners' association.

The legislative intent pertaining to this statute, which was adopted in 1995, gives strong support that Nosko Tract – Phase Two is a homeowners' association as defined by statute.

B. COURTS OF OTHER STATES HAVE HELD THAT HOMEOWNERS' ASSOCIATIONS CAN BE CREATED BY IMPLICATION.

They have determined that organizations created by contract or covenant that meet the definition of the equivalent of a homeowners' association in their states are homeowners' associations.

C. EVEN IF NOSKO TRACT – PHASE TWO IS NOT A HOMEOWNERS' ASSOCIATION UNDER THE STATUTE, IT STILL HAS A RIGHT TO AMEND THE RMA TO MORE FORMALLY GOVERN ITSELF.

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[1] These parties were involved in an earlier lawsuit concerning the gate. *See* Declaration of James Walsh, Exhibit 22. (CP 174) In that lawsuit, the parties assumed that the CC&Rs for Nosko Tract applied only to Nosko Tract – Phase Two, the nine lots involved in this litigation. That was an error that was passed on to Walsh's counsel in this lawsuit. After this error was pointed out, Walsh immediately dropped their contention that they had a right to amend the CC&Rs for Nosko Tract but still contend that they have a right to adopt the Bylaws, Fine Schedule and Appellate Procedure under the RMA.

There are no provisions in the RMA that provide for consequences for violation of the Rules of Conduct.

D. A PRIVATE ORGANIZATION HAS A RIGHT TO GOVERN ITSELF.

Courts generally do not interfere with the internal governance of an association and in this case it should not. The Trial Court left as the only option for violating the Rules of Conduct to file a lawsuit.

E. IF THE DEFINITION OF A HOMEOWNERS' ASSOCIATION IN WASHINGTON IS TOO BROAD, THE PROPER REMEDY IS TO GO BACK TO THE LEGISLATURE AND HAVE THEM CHANGE THE DEFINITION TO INCLUDE EXCLUSIONS FROM IT.

Grafting on exceptions to the legislation by court fiat is simply not allowed.

V. ARGUMENTS

A. THE ROLE OF THE APPELLATE COURT

In reviewing an order on summary judgment, the appellate court engages in the same inquiry as the trial court and considers the facts in the light most favorable to the non-moving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment will be granted if the record demonstrates that there is no genuine issue as to any material fact, *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986), and that the moving party is entitled to judgment as a matter of law, CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. STATUTORY INTERPRETATION

The rules of statutory interpretation are clear. Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.

The definition of a homeowners' association in RCW 64.38.010(11) is clear and unambiguous. There is nothing to interpret and the plain meaning of the wording of the statute must be enforced. *Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc.*, 125 Wn. App. 227, 103 P.3d 1256 (2005). A homeowners' association means a corporation, unincorporated association, or other legal entity,

> each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of ownership of property is obligated to pay ... maintenance costs, or for improvement of real property other than that which is owned by the member. RCW 64.38.010(11)

All of the owners of property in Nosko Tract – Phase Two fit this definition. There is no ambiguity in the language and therefore there is nothing to interpret.

The Court's job is to apply the definition. It is not the Court's job to graft onto the definition exceptions where no such exceptions exist.

The Court's oral decision leaves the respective land owners with no clear directive regarding their respective rights in Nosko Tract – Phase Two.

> Where the legislature could have restricted the application of a statute, but chose not to, we will not read additional

> restrictions into the statute. *See Springer v. City & County of Denver,* 13 P.3d 794, 804 (Colo. 2000); *see* also *Mason v. People*, 932 P.2d 1377, 1380 (Colo. 1997) (courts presume that if the General Assembly intended a statute to achieve a particular result, it would have employed terminology clearly expressing that intent).

Hiwan Homeowners Ass'n v. Knotts, 215 P.3d 1271, 1275 (Colo. 2009).

The legislature did not say that members of road maintenance agreements, parties to a contract with fewer than "X" lots or owners, entities with a budget less than "X" dollars are not subject to the definition. The Court has no authority to graft on to the statute exceptions because the Court does not like the consequences.

> In *HomeStreet*[2], we affirmed that we first look to a statute's plain language when interpreting its meaning. *HomeStreet,* 166 Wn.2d at 451 (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). Absent ambiguity, the interpretation of a statute's plain language is guided by the common and ordinary meaning of its words. E.g., *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

Bowie v. Dep't of Revenue, 171 Wn.2d 1, 11-12, 248 P.3d 504 (2011). *See* also, *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

Further, the legislative history shows that the legislature considered that there might be associations of various sizes. The testimony for the bill included testimony that "[a]djustments need to be made in the bill to protect small associations from some of the

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[2] *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2008).

bookkeeping details." (CP 147) For example, RCW 64.38.045(3) requires that the association's books be audited annually unless waived by sixty-seven percent (67%) of the votes cast at a meeting so that small associations do not have to incur this expense. Although reserve studies are required, there is an exception with certain criteria that fit smaller associations. (RCW 64.38.065 and .090.) The legislature considered homeowners' associations might be of different sizes and made the statute flexible to accommodate them.

Further, the legislature intended to avoid the types of problems Nosko Tract – Phase Two is experiencing. Right now, Plaintiff and his son are creating all kinds of problems for the Defendants and others by blocking the road, driving slowly, walking on the road, *et cetera*, with their intent only to antagonize people. (CP 149) This Court's ruling leaves these people with only one recourse: file a lawsuit every time someone blocks the road or otherwise violates the Rules of Conduct expressed in the RMA. This is exactly the kind of hardship the legislature intended to deal with. Again, in the testimony for the bill (CP 147), the legislature noted:

> The bill will address problems that residential homeowners associations are having; right now the associations are practically unregulated. The associations sometimes take advantage of uninformed owners and such owners suffer major consequences.

The reverse is true as well. Sometimes homeowners take advantage of other members of the association. Lawsuits are expensive and time

consuming. The legislature allows associations to adopt rules and regulations to address obnoxious behavior that can result in fines to avoid the need for lawsuits. *See* RCW 64.38.020(1) and (11).

In the Final Bill Report, Exhibit A, p. 3 of 3 (CP 144), instead of forcing owners who own property subject to a covenant or contract to bring a lawsuit, the legislature intended that internal matters be governed by the homeowners' association. It notes: "A violation of the act entitles an aggrieved party to any available legal or equitable remedy, and if appropriate, an award of reasonable attorney's fees." The legislature specifically required that before an association could levy fines, it adopt a fine schedule and appellate procedure. *See* RCW 64.38.020(11). The legislature provided for the internal, rational and fair governance of an association. The Court's oral decision does the exact opposite.

In *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), the court interpreted a statute that dealt with overtime for interstate truckers. It held that the plain language of a statute required overtime compensation for hours worked over 40 hours per week for interstate driving when there was no suggestion in the statute that there was a requirement that only the hours worked within this state counted. The only exception to the statute applied to interstate bus or truck drivers who are subject to the Federal Motor Carrier Act ("FMCA"). The court held that on its face, the statute, RCW 49.46.130(1) did not limit the requirement for overtime pay to hours worked in Washington nor did it do so specifically for truck drivers subject to the FMCA. The FMCA applied

by definition, to truck drivers who performed as part of their work driving in interstate trucking and commerce out of state. It did not apply to the truck driver who occasionally drove out of state.

Further, the court held at 712, that statutes should be interpreted to further, not frustrate, their intended purpose. (*See* RCW 64.38.005(A) above.) The Final Bill Report for the homeowners' association statute (CP 142) states in the Background section:

> A homeowners' association is an organization formed in a planned unit community or given homeowners' area to provide management and maintenance for common areas in the community, such as parks, lakes, roads, and community centers. Often these associations are formed by the land developer or the builder of planned unit developments pursuant to a restrictive covenant or a contract. Homeowners' associations typically impose and collect assessments on each owner of property in the community for the maintenance and repair of the common areas. In addition, homeowners' associations may adopt rules concerning property use in the community and may impose fines for violations of those rules. (Emphasis added.)

The legislature specifically found that homeowners' associations are formed by restrictive covenants or contracts. That is exactly the situation with Nosko Tract – Phase Two.

Continuing, the legislature noted:

> Currently, there is no statutory law that specifically addresses the organization, management, and powers of homeowners' associations. Homeowners' associations may organize as nonprofit associations governed by their own rules and procedures. In addition, homeowners' associations may organize as nonprofit corporations.

The legislature went on in this report to acknowledge that these corporations could be managed by a board of directors. There is no

express allowance for and no suggestion in the legislative history for an exception to the application of this definition. There is no ambiguity in the statute. It should be enforced as written.

The Court should avoid judicial activism as Justice Talmadge argued in a concurring opinion in the case of *Island County v. State*, 135 Wn.2d 141, 174, 955 P.2d 377 (1998),

> The concurrence's approach is judicial activism in full flower: "By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit." Lino A. Graglia, It's Not Constitutionalism, It's Judicial Activism, 19 HARV. J.L. PUB. POL. 293, 296 (1996). Unlike the concurrence, I do not believe the judiciary has a charter, in the guise of constitutional interpretation, to substitute itself for the executive and legislative branches of government. We do not have a constitutional mandate to roam across the governmental landscape changing in our discretion decisions by other constitutional branches of government with which we disagree.

The policy decision on who to include in the definition of a homeowners' association was made by the legislature. It is not the Court's role to usurp that authority.

C. FOREIGN COURTS - HOMEOWNERS' ASSOCIATION CREATED BY IMPLICATION; AMENDMENTS TO THE RMA ARE VALID.

Can a homeowners' association be formed by implication by a later enacted statute which establishes homeowners' associations? This question has not been answered directly in Washington but cases from other states have held that it can be. In *Hiwan Homeowners Ass'n v.*

Knotts, supra., a Colorado court held that a homeowners' association[3] was formed when restrictive covenants were recorded and a limited partnership filed subdivision plats which were later amended by a two-thirds vote of the homeowners to form a homeowners' association. Some of the homeowners objected but the Court of Appeals in Colorado held that the homeowners were members of the homeowners' association because the definition of a homeowners' association in Colorado included owners of units in the subdivision who were: (1) obligated by declaration; (2) to pay for maintenance or improvements; (3) of real estate not owned by them. As the owners of this particular area met that definition, they were defined as a homeowners' association. There is no indication in the opinion how many lots were in the association or even what property they maintained. The court's only concern was whether the definition applied.

In *Hiwan,* some of the homeowners claimed that the Act did not apply because the Hiwan subdivision is not a common interest community (homeowners' association) under the statute. The trial court was asked to determine whether the Colorado community interest statute applied to Hiwan and whether Hiwan was a common interest community. The trial court held that the community met the definition outlined above. The appellate court noted that whether Hiwan was a common interest community under the Act was a question of statutory interpretation; that their job in interpreting the statute was to give effect to the General

[3] The term used in Colorado is a "Common Interest Community," the definition for which is nearly identical to Washington's homeowners' association.

Assembly's intent which was determined by giving the words in the statute their plain and ordinary meaning. The court relied on the interpretation given to similar statutes from other states and its own definition of common interest communities which was:

> Common interest community' means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration.

The court first looked at the language of the covenants for Hiwan and determined its language anticipated the formation of an association that would have responsibilities, including collecting mandatory assessments for the improvement of property. The Hiwan covenant read in pertinent part:

> Assessments will be made by the Association and payment of the same shall be mandatory by the property owners within the subdivision and such assessments shall be considered a lien on the property to the extent not paid.

The RMA for Nosko Tract – Phase Two is similar. It identifies specific property in Clark County; it states that the road is dedicated on the condition that it be used for the benefit of the persons residing in Phase Two which is to be:

> used and administered under such regulations consistent with other conditions set forth in this instrument as may, from time to time hereafter, be established by the owners of THE NOSKO TRACT – PHASE TWO for the purpose of safeguarding the road/roads or improvements thereon from damage or deterioration, and for the further purpose of protecting the residents of THE NOSKO TRACT – PHASE TWO from any uses or conditions in or upon said private

> road or property which are, or may be, detrimental to the amenities of the neighborhood. (CP 17)

The RMA contemplates not only the regulations in the original, but specifically provides that amendments to the RMA can be made in the future. It also requires that the road be maintained and provides for Rules of Conduct which include, by agreement of the owners, a speed limit which prohibits any owner from engaging in any activity which might reasonably interfere with the traffic flow, maintenance, repair or safety of the road.

If the legislature wanted to carve out exceptions to restrict the application of the definition of "homeowners' association," it would have done so. It chose not to. If the Plaintiff objects to the application of this statute to his property, his remedy is to have the legislature change the definition, not to have this Court create exceptions when none exist.

In *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colorado 2003), the court determined that the homeowners' association was formed by implication. In Evergreen, the only commonly held property for which the owners paid maintenance was a park. When protective covenants were originally filed for the subdivision, lot owners were not required to be members of or pay dues to the association. In 1995, nine (9) years after the property owner purchased his lot, at least seventy-five percent (75%) of the lot owners voted to add a new provision to the covenants which required all lot owners to be members of and pay assessments to the association and permitted the association to impose liens on the property of owners who failed to pay their annual assessments. The Supreme Court

of Colorado held the amendment to the covenants valid and binding since its terms were within the scope of the modification clause of the original covenants. The court went further and held that under the Colorado Common Interest Ownership Act and its definition of a "common interest community" which is cited in the *Hiwan* case, this property met the definition and impliedly formed a homeowners' association.

D. THE RMA ITSELF ALLOWS WALSH TO ADOPT THESE INTERNAL GOVERNING PROCEDURES BY AMENDING THE RMA – COVENANT INTERPRETATION.

The interpretation of language in a restrictive covenant is a question of law. The court's primary goal in interpreting the restrictive covenant is to determine the party's intent. A covenant is construed in its entirety, giving the language its ordinary and common meaning. The court must give effect to the purposes of the covenant. The courts will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests. *Wilkinson v. Chiwawa Cmtys. Ass'n,* 180 Wn.2d 241, 327 P.3d 614 (2014); *Riss v. Angel,* 131 Wn.2d 612, 934 P.2d 669 (1997).

Although the interpretation of a covenant is a question of law, the drafter's intent is a question of fact but where reasonable minds could reach but one conclusion questions of fact may be determined as a matter of law. In determining the drafter's intent, courts give covenant language its ordinary and common use and will not construe a term in such a way so as to defeat its plain and obvious meaning. *Wilkinson, supra,* at 250.

While Washington courts once strictly construed covenants in favor of the free use of land, they no longer apply this rule where the dispute is between homeowners who are jointly governed by the covenants and who are not the declarant. This is because covenants tend to enhance, not inhibit, the efficient use of land. Therefore, the special emphasis on interpreting covenants that protect the homeowners' collective interests. *Wilkinson, supra,* at 249-250.

Halme knew the RMA could be amended when they purchased their property because the RMA was recorded. *See Ebel v. Fairwood Park II Homeowners' Association*, 136 Wn. App. 787, 150 P.3d 1163 (2007).

An organization can amend its governing documents as long as the amendments are consistent with provisions in the governing documents, but cannot add new provisions. As long as the restrictions on the property owners are not significantly changed, the homeowners can amend them.

The RMA gives the Association the authority to adopt regulations to administer the RMA. The first paragraph of the RMA states in pertinent part:

> The private road herein dedicated is to be used and administered under such regulations consistent with other conditions set forth in this instrument as may, from time to time hereafter, be established by the owners of THE NOSKO TRACT – PHASE TWO for the purpose of safeguarding the road/roads or improvements thereon from damage or deterioration, and for the further purpose of protecting the residents of THE NOSKO TRACT – PHASE TWO from any uses or conditions in or upon said private road or property which are, or may be, detrimental to the amenities of the neighborhood.

The phrase "consistent with other conditions... as may, from time to time hereafter, be established by the owners of THE NOSKO TRACT – PHASE TWO..." clearly establishes that the declarant meant to allow amendments to the RMA.

Further, the conditions were meant to be flexible. The Rules of Conduct on page. 4 of the RMA require that a "reasonable" speed limit be observed at all times, as deemed appropriate by the owners. The manager is authorized to post speed limit signs along the roadway. Further, no parking or storing of vehicles or other equipment is allowed on the roadway or its shoulders and no activity is allowed which might reasonably interfere with the traffic flow on this narrow roadway. Any owner in Phase Two can enforce the speed limit but there is no mechanism in the RMA to do so. This is where either the amendments to the RMA as taken and as contemplated by Walsh and/or Chapter 65.38 RCW come in. They provide the enforcement mechanism.

E. THE PLAIN LANGUAGE OF THE RMA

The RMA clearly gives the owners of Phase Two the right to amend the document as long as the amendments are consistent with conditions set forth in the RMA. Amendments can be made by a majority vote of the owners. *See* page 2 under paragraph Manager, A. (CP 18) The owners of Phase Two have decided to form a homeowners' association under Chapter 64.38 RCW and elect a Board of Directors, adopt Bylaws and a Fine Schedule and Appellate Procedure under the statute to better run the Association. This has become necessary to

enforce the RMA for violations of the Rules of Conduct, to further prevent the harassment Walsh and their guests have had to endure.

Further, under the homeowners' association statute, the owners can levy fines and penalties for violations of the RMA and Rules and Regulations if they are adopted as it is authorized to adopt under RCW 64.38.020(11). The owners' ability to formalize its activities is not allowed only by statute, however. The plain wording of the first paragraph of the RMA gives the owners these same abilities as long as they are consistent with the conditions already existing in the RMA. There is nothing in the RMA that prohibits formalizing the relationship among the owners. In fact, formalizing their operations will give certainty to all of the owners as reflected in the legislative history of the statute.

F. RIGHT TO AMEND THE RMA

In *Ebel, supra*, the court held that amendments to covenants are permissible as long as they are adopted according to the procedures set up in the covenants and they must be consistent with the general plan of development. However, an amendment may not create a new covenant that has no relation to the existing covenants.

The owners of Phase Two can amend the RMA as long as the amendments are consistent with existing covenants. There is nothing in the RMA that prohibits the formation of a homeowners' association and in fact, such is contemplated in the wording of the RMA. As long as "such regulations" are consistent with conditions set forth in the RMA, they may be "established by the owners of The Nosko Tract – Phase Two...."

There is one difference between *Ebel* and this case and that is that in 1969, a plat for the association was recorded which referred to a homeowners' association. The fact that there was a specific reference to a homeowners' association was fortuitous and irrelevant. The fact that in 1995 a homeowners' association statute was passed using the same title. i.e., "Homeowners' Association," has no rational relationship to that term being used in the plat. The court's rationale depends on questionable logic and even though the court does not refer to Chapter 64.38 RCW, the results should be the same.

In our case, the RMA specifically allows for amendments and to establish regulations consistent with other conditions set forth in the RMA. These have to be geared to protecting the residents of Nosko Tract – Phase Two from uses or conditions to the private road or property which may be detrimental to the neighborhood.

The only actions taken so far by the owners is to organize themselves, enact governing documents to administer their affairs and adopt of a fine schedule and appellate process. They will enact further regulations to effectuate the intent of the Rules of Conduct by prohibiting the type of conduct that has been taking place there. But, these restrictions are consistent with the existing Rules of Conduct which prohibit an owner from engaging in any activity which might interfere with the traffic flow or safety of the road. *See* RMA, Rules of Conduct, (A), (C), (D), (F) and (G). The rules that will be adopted are consistent with the Rules of Conduct. No covenants inconsistent with these Rules of Conduct in the

RMA in general will be enacted. But, these parties are parties to the contract, the contract says it can be amended and these parties should have the right to amend it.

The *Evergreen* court, *supra,* distinguished two lines of cases based on the different factual scenarios and the severity of the consequences of the facts presented. It held that in cases where courts disallowed the amendment of covenants, the impact upon the objecting lot owner was generally far more substantial and unenforceable than the amendment at issue in the case. The cases where covenants were not allowed to be amended included cases in which covenants previously imposed assessments only on private lots were amended to assess the sole commercial parcel in a subdivision at a substantially higher rate, *Caughlin Ranch*, 109 Nev. 264, 849 P.2 310 (1993); covenants that changed the setback requirement rendering plaintiff's lot unbuildable; *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); and *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000). On the other hand, multiple cases from other states where the amendment of covenants to impose mandatory assessments on lot owners for the purpose of maintaining, elements of the subdivision were validated. These cases included *Zito v. Gerken*, 225 Ill. App. 3d 79, 587 N.E.2d 1048 (1992), where the homeowners' association adopted mandatory assessments that were clear, unambiguous and reasonable. The court found that the amendment did not seek to change the character of the subdivision and did not impose unreasonable burdens upon any lot owner; *Windemere*

Homeowners' Association, Inc. v. McCue, 1999 MT 1992, 990 P.2d 769, 297 N. 77 (1999) where a majority of homeowners voted to amend the covenants to create a homeowners' association authorized to levy the cost of road maintenance against property owners; and *Sunday Canyon Property Owners' Association v. Annett*, 978 S.W.2d 654 (Tex. Ct. App. 1998), where the court allowed the majority of the owners to adopt an amendment creating a homeowners' association for mandatory lot assessments. The court allowed this despite the fact that the creation of the homeowners' association exceeded the original purpose of the right to amend contemplated by purchasers prior to the amendment. The court recognized the right of persons to contract in relationship to their property as they see fit. The court recognized that this right is a right of ownership in property, and embraced the ability to impose on the property restrictive covenants and to abrogate or modify them.

The cases above argue strongly that the RMA can be modified to create a homeowners' association. People have a right to contract and if the contract allows for its modification, then they should be allowed to modify the contract. The Court should not interfere with the private contractual rights of parties.

G. COURTS DO NOT INTERFERE WITH THE INTERNAL GOVERNANCE OF ASSOCIATIONS.

Courts generally refrain from interfering in the internal affairs of private, voluntary associations. The only times they do interfere are when there are disputes involving property rights of members or whether the

organization's proceedings were regular, in good faith, and not in violation of the laws of the organization or the laws of the state. Nosko Tract – Phase Two has decided to put its house in order. It has decided to begin to operate more formally as an association. Without this authority to internally govern itself, the anarchy that has existed since Halme's arrival may well continue. *See Stivers v. Blethen*, 124 Wash. 473, 215 P. 7 (1923), and *Anderson v. Enterprise Lodge No. 2*, 80 Wn. App. 41, 906 P.2d 962 (1995), for support for the proposition that courts do not interfere with the internal affairs or disputes between members of unincorporated associations.

VI. ATTORNEYS' FEES

The RMA on p. 4 under the paragraph entitled "Attorneys' Fees" provides for the award of reasonable attorney's fees and costs to the prevailing party in any action to enforce the agreement. RCW 64.38.050 also entitles an aggrieved party to any remedy provided by law or in equity and in an appropriate case, the court may award reasonable attorneys' fees to the prevailing party. Walsh requests that this Court reverse the award of attorneys' fees to Halme in the court below and award them attorneys' fees both in the court below and in the Court of Appeals.

VII. CONCLUSION

For all of the reasons stated above, Appellants ask this Court to reverse the trial court's decision awarding summary judgment and

attorneys' fees to Halme and instead, enter orders determining that the owners of Nosko Tract – Phase Two have a right to amend the RMA to allow them to adopt Bylaws, Rules and Regulations, a Fine Schedule and an Appellate Procedure either under the RMA or as a homeowners' association under the statute and award Walsh attorneys' fees both in the trial court and in this Court.

DATED this 25TH day of MARCH, 2015.

Respectfully Submitted,

LANDERHOLM, P.S.

MICHAEL SIMON, WSBA No. 10931
Attorneys for Appellants/Defendants

LANDERHOLM PS

March 25, 2015 - 4:37 PM

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